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# Premium Vegetable Oils Sdn Bhd v ICG Systems Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–945 OF 2000

B RAMLY ALI J

1 AUGUST 2006

C *Civil Procedure — Action — Commencement — Fraud — Application under s 304 of the Companies Act 1965 — Company went into voluntary liquidation — Whether plaintiff has locus standi to commence action as creditor*

D *Companies and Corporations — Directors — Misfeasance summons — Fraud on creditors — Application by creditor under s 304 of the Companies Act 1965 for declaration — Company went into voluntary liquidation — Whether plaintiff should have filed a 'proof of debt' — Whether plaintiff has locus standi to commence action as creditor — Whether plaintiff a 'creditor'*

E

The issues are regarding the contents of the contracts, the responsibilities of the parties and whether the first defendant has completed it's agreed responsibilities. The plaintiff and the first defendant entered into a number of contracts. The amount paid by the plaintiff to the first defendant between 25 July 1996 to 27 January 1999 is RM333,687.25. On 7 May 1999, the first defendant went into voluntary liquidation. The issue between the fourth defendant and the plaintiff is regarding s 304 of the Companies Act 1965 ('the Act') and the claim that the fourth defendant being one of the directors of the first defendant, is responsible with the other defendants for the fraud committed against the plaintiff. The plaintiff filed the present action against all the defendants seeking a declaration under s 304(1) of the Act. The plaintiff alleges that the first defendant has breached all the agreements in failing to complete all the contract agreements within the prescribed time. Even though the agreement between the plaintiff and the first defendant was not completed the first defendant went into voluntary liquidation. The plaintiff, in instituting this action alleges that it is a creditor of the first defendant, ostensibly on the basis that the first defendant is liable to the plaintiff for breach of contract. The fourth defendant disputes that the plaintiff is a creditor of the first defendant. The fourth defendant contends that the plaintiff does not have the locus standi to institute the present action under s 304(1) of the Act and that the plaintiff's claim against the fourth defendant is misconceived. The fourth defendant also argues that the plaintiff (who claimed to be a creditor to the first defendant) should have filed a 'proof of debt' since the first defendant is now under liquidation (voluntary liquidation). These grounds of judgment are in respect of the fourth defendant's application (vide encl 39) for determination on points of law and/or facts as a preliminary issue before the trial of the present action pursuant to O 33 of the Rules of High Court 1980.

**Held**:

(1) The word 'creditor' as being used in s 304 of the Act should be interpreted in the widest sense and that it includes all persons having pecuniary claims against the company, (in this respect the first defendant) and the creditor should be a person who could enforce its claim against the company by an action of debt and need not establish a finding of liability before becoming a creditor. Section 217 of the Act provides that a 'creditor' includes a 'contingent or prospective creditor'. The word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. That being the case, the court is of the view that the plaintiff comes within the ambit of 'prospective creditor' for it to commence the present action against all the defendants (see paras 17, 19).

(2) The issues whether the plaintiff succeeds or not at the end of the case is immaterial at the commencement stage. On the general rule of construction of statutes, that the same term or expression used in different part of a statute must be accorded the same meaning unless the context otherwise requires. Therefore the terms 'creditor' in s 304 of the Act must be taken to also mean to include 'contingent or prospective creditor' as being used in s 217(1)(b) of the same Act. Being a creditor (or prospective creditor) the plaintiff has the necessary locus standi to institute an action against the fourth defendant under s 304(1) of the Act (see paras 19–20, 23).

(3) When the first defendant went into voluntary liquidation on 7 May 1999, the second to fourth defendants (who were directors of the first defendant at the material times) have failed to summon a meeting of the creditors of the first defendant as required under s 260 of the Act. No notice was given by the directors to the plaintiff as creditor. Such being the case, it is justifiable that the plaintiff could not have exercised its right as a creditor to file a 'proof of debt'. In any event, there is nothing to stop the plaintiff from instituting an action under s 304(1) of the Act, against the first defendant as well as all the directors (second to fourth defendant) if there is a reasonable cause of action to show that the business of the first defendant has been carried on with intent to defraud creditors by any person (see para 25).

**[Bahasa Malaysia summary**

Isu-isu di sini adalah berhubungan dengan kandungan kontrak-kontrak, tanggungjawab pihak-pihak dan sama ada defendan pertama telah menyempurnakan tanggungjawabnya yang dipersetujui. Plaintif dan defendan pertama memasuki beberapa kontrak. Amaun yang dibayar oleh plaintif kepada defendan pertama di antara 25 Julai 1996 sehingga 27 Januari 1999 ialah RM333,687.25. Pada 7 Mei 1999, defendan pertama memasuki penyelesaian secara sukarela. Isu di antara defendan keempat dan plaintif ialah berhubungan s 304 Akta Syarikat 1965 ('Akta tersebut') dan tuntutan bahawa defendan keempat adalah salah seorang pengarah-pengarah defendan pertama, dan bertanggungjawab dengan defendan-defendan yang lain atas fraud yang telah dilakukan terhadap plaintif. Plaintif memfailkan tindakan ini terhadap kesemua defendan-defendan memohon satu deklarasi di bawah s 304(1) Akta tersebut. Plaintif mengatakan bahawa defendan

pertama telah memungkiri kesemua perjanjian-perjanjian dalam kegagalannya menyempurnakan kesemua perjanjian-perjanjian kontrak dalam masa yang diberi. Walaupun perjanjian di antara plaintif dan defendan pertama tidak disempurnakan, defendan pertama memasuki penyelesaian secara sukarela. Plaintif, dalam mengambil tindakan ini mengatakan bahawa ia adalah pemiutang defendan pertama, kononnya atas dasar defendan pertama adalah bertanggungjawab kepada plaintif kerana kemungkiran kontrak. Defendan keempat mempertikaikan bahawa plaintif ialah pemiutang defendan pertama. Defendan keempat menegaskan bahawa plaintif tidak mempunyai locus standi untuk mengambil tindakan ini di bawah s 304(1) Akta tersebut dan tuntutan plaintif terhadap defendan keempat adalah salah tafsir. Defendan keempat juga mengatakan bahawa plaintif (yang mendakwa dirinya sebagai pemiutang defendan pertama) sepatutnya memfailkan 'bukti hutang' oleh kerana defendan pertama kini di bawah likuidasi (penyelesaian secara sukarela). Alasan penghakiman ini adalah berhubungan dengan permohonan defendan keempat (melalui kandungan 39) untuk memutuskan perkara undang-undang dan/atau fakta-fakta sebagai isu awalan sebelum perbicaraan tindakan ini di bawah A 33 Kaedah-Kaedah Mahkamah Tinggi 1980.

**Diputuskan**:

(1) Perkataan 'pemiutang' digunakan di s 304 Akta tersebut patut ditafsirkan dalam makna yang paling luas dan ia termasuk kesemua orang yang mempunyai tuntutan wang terhadap sesebuah syarikat, (dalam kes ini defendan pertama) dan pemiutang sepatutnya orang yang dapat menguatkuasakan tuntutannya terhadap syarikat tersebut melalui satu tindakan hutang dan tidak perlu mewujudkan satu penemuan liabiliti sebelum menjadi seorang pemiutang. Seksyen 217 Akta tersebut menyatakan seorang 'pemiutang' termasuk 'pemiutang tertakluk atau bakal'. Perkataan 'pemiutang bakal' merujuk kepada pemiutang di mana tuntutan untuk hutang atau hak untuk melaksanakan tuntutan sebegini adalah dijangka atau kemungkinan akan berlaku di masa hadapan. Mahkamah ini berpendapat bahawa plaintif termasuk dalam 'pemiutang bakal' untuknya memulakan tindakan ini terhadap kesemua defendan-defendan (lihat perenggan 17, 19).

(2) Isu-isu sama ada plaintif akan berjaya atau tidak pada akhir kes adalah tidak penting di permulaan kes ini. Peraturan am pentafsiran sesuatu statut, bahawa terma atau penyataan yang digunakan di pelbagai bahagian yang lain di statut tersebut mesti diberikan maksud yang sama kecuali konteksnya berlainan. Dengan itu perkataan 'pemiutang' di s 304 Akta tersebut mesti di anggap sebagai termasuk 'pemiutang tertakluk atau bakal' seperti yang digunakan di s 217(1)(b) Akta yang sama. Sebagai seorang pemiutang (ataupun pemiutang bakal), plaintif mempunyai locus standi untuk memulakan tindakan terhadap defendan keempat di bawah s 304(1) Akta tersebut (lihat perenggan 19–20, 23).

(3) Apabila defendan pertama memasuki penyelesaian secara sukarela pada 7 Mei 1999, defendan-defendan kedua hingga keempat (yang merupakan pengarah defendan pertama pada masa yang material) telah gagal memanggil satu mesyuarat pemiutang-pemiutang defendan pertama seperti yang diperlukan

di bawah s 260 Akta tersebut. Tiada notis yang diberikan oleh pengarah-pengarah kepada plaintif sebagai pemiutang. Disebabkan perkara sebegini, adalah menjustifikasikan bahawa plaintif tidak dapat melaksanakan haknya sebagai pemiutang untuk memfailkan 'bukti hutangnya'. Dalam apa jua keadaan, plaintif tidak dihalangkan daripada memulakan satu tindakan di bawah s 304(1) Akta tersebut, terhadap defendan pertama dan juga kesemua pengarah-pengarah (defendan kedua sehingga keempat) sekiranya terdapat tindakan yang munasabah menunjukkan perniagaan defendan pertama dijalankan dengan hasrat menipu pemiutang oleh sesiapapun (lihat perenggan 25).]

**Notes**

For cases on commencement of action, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 58–70.

For cases on misfeasance summons, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 250–251.

**Cases referred to**

*Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v Emporium Jaya (Jerantut) Sdn Bhd* [2002] 1 MLJ 182 (refd)

*Ganda Holdings Bhd v Pamaron Holdings Sdn Bhd* [1989] 1 MSCLC 90.286 (refd)

*Krishnan Rajan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149 (refd)

*Kumarasamy a/I Sengainy & Ors v Revathy Development (M) Sdn Bhd* [1995] 2 MLJ 586 (refd)

*Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (refd)

*Tan Ching Choong & Ors v Ekabina Sdn Bhd* [2002] 5 MLJ 654 (refd)

**Legislation referred to**

Companies Act 1965 ss 217(1)(b), 260, 304(1)

Rules of High Court 1980 O 18 r 19(1)(a), O 33 r 2

*T Kuhan (Badri Kuhan Yeoh & Ghandi) for the plaintiff.*

*Janice Yap (Chooi & Co) for the fourth defendant.*

**Ramly Ali J:**

**[1]** These grounds of judgment are in respect of the fourth defendant's application (vide encl 39) for determination on points of law and/or facts as a preliminary issue before the trial of the present action pursuant to O 33 of the Rules of High Court 1980.

**[2]** The points to be determined by this court (as preliminary issues before trial) are:

(i) whether the plaintiff is a creditor under s 304(1) of the Companies Act 1965; and

(ii) if the answer to the above is in the negative, whether the plaintiff has locus standi to bring this action against the fourth defendant pursuant to s 304(1) of the same Act.

FACTUAL BACKGROUNDS

**[3]** The plaintiff, in the present action, is seeking a declaration under s 304(1) of the Companies Act 1965:

(a) that the second, third and fourth defendants conducted the business of the first defendant with intent to commit fraud on the plaintiff who was a creditor of the first defendant;

(b) that the second, third and fourth defendants as directors of the first defendants with knowledge conducted the business of the first defendant to commit fraud on the plaintiff who was a creditor of the first defendant; and

(c) that the second, third and fourth defendants are personal liable Jointly and severally to the plaintiff for the sum of RM2,939,687.25.

The plaintiff is claiming RM2,933,687.25 and interest and costs against all the defendants.

**[4]** The chronology of events leading up to the present action by the plaintiff against all the defendants are as follows:

(i) on 11 March 1996, the plaintiff and the first defendant entered into an agreement whereby the first defendant is to prepare and supply application software for Contract Management for Sale and Purchase and for Managing Foreign Exchange/Spread Accounting Contracts. The contract sum is RM144,000 (the first agreement);

(ii) on 29 April 1998, the second agreement was entered into between the plaintiff and the first defendant for Rapid Application Planning and Prototyping (RAPP) System for a total of eight modules for a contract sum of RM650,000, ie three initial modules at RM250,000 and the remaining five modules option to purchase at RM400,000 (the second agreement);

(iii) on 28 May 1998, the third agreement was entered into between the plaintiff and the first defendant in respect of Integrating Software where the defendant is to maintain the system for five years from the date of installation involving a total cost of RM250,000;

(iv) amount paid by the plaintiff to the first defendant between 25 July 1996 to 27 January 1999 is RM333,687.25;

(v) on 7 May 1999, the first defendant went into voluntary liquidation;

(vi) on 22 May 2000, the present action was filed by the plaintiff against all the defendants.

**[5]** The plaintiff alleges that the first defendant has breached all the agreements as follows:

(i) the first defendant has failed to complete the Contract Management System in the time period allowed, ie four weeks;

(ii) the first defendant has failed to complete the System for Managing Foreign Exchange and Spread Accounting and Management Information System for Sales and Purchases;

(iii) the first defendant has failed to complete works under RAPP Agreement;

(iv) the first defendant has failed to complete the System Integration;

(v) even though the agreement between the plaintiff and the first defendant was not completed the first defendant went into voluntary liquidation on 7 May 1999;

(vi) the first defendant has not todate forwarded software source codes to the plaintiff; and

(vii) the first defendant has failed to maintain the system for a five years' period from the date of installation (installation has not been completed).

**[6]** The plaintiff, in instituting this action alleges that it is a creditor of the first defendant, ostensibly on the basis that the first defendant is liable to the plaintiff for breach of contract.

**[7]** The fourth defendant disputes that the plaintiff is a creditor of the first defendant. Nor can it qualify even as a 'contingent creditor'. The fourth defendant contends that the plaintiff does not have the locus standi to institute the present action under s 304(1) of the Companies Act 1965 and that the plaintiff's claim against the fourth defendant is misconceived.

**[8]** Initially, the fourth defendant applied by way of summons in chambers dated 15 February 2001 (encl 14) to strike out the writ and statement of claim pursuant to O 18 r 19(1)(a) of the Rules of High Court 1980. The said application was dismissed by the learned SAR and upon appeal to judge in chambers, the decision of the learned SAR was affirmed and the appeal was dismissed. The fourth defendant then appealed to the Court of Appeal.

**[9]** Vide encl 39, the fourth defendant is making application under O 33 of the Rules of High Court 1980. The relevant provisions is O 33 r 2 which reads as follows:

> The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

**[10]** The court is empowered under O 33 r 2 to order a trial of a preliminary issue if:

(i) the trial of such preliminary issue will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole (see *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 and *Kumarasamy a/I Sengainy & Ors v Revathy Development (M) Sdn Bhd* [1995] 2 MLJ 586;

(ii) there is no substantial disputes of facts (see *Krishnan Rajan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149);

(iii) the outcome of the preliminary issue or question would result or substantially result in disposal of the whole case (see *Krishnan Rajan v Bank Negara Malaysia*).

**[11]** In the present application, the preliminary issues framed for determination (vide encl 39) by the fourth defendant deal with the plaintiff's locus standi to institute the present action under s 304(1) of the Companies Act 1965 It has been held in *Tan Ching Choong & Ors v Ekabina Sdn Bhd* [2002] 5 MLJ 654 that an issue pertaining to a plaintiff's locus standi to institute an action is suitable for decision as a preliminary point pursuant to O 33 r of 2 of the Rules of High Court 1980. If the preliminary issue of the plaintiff's locus standi is determined in favour of the fourth defendant the action against the fourth defendant would be dismissed. Therefore, the court is satisfied that the preliminary issues framed by the fourth defendant in encl 39 are suitable to be determined before the trial of the whole action pursuant to O 33 r 2.

**[12]** In supporting his application under O 33 r 2, the fourth defendant is relying on the following undisputed facts, namely:

(a) the first defendant's liability for the purported breach of contract has neither been determined nor adjudicated upon;

(b) it is in fact by this very action that the plaintiff seeks determination of the first defendant's alleged liability for breach of contract;

(c) such liability has been disputed by the first defendant;

(d) the alleged losses and/or damages purportedly suffered by the plaintiff as a result of the alleged breach of contract (which is in any event denied) have yet to be proved by the plaintiff and ascertained by the court;

(e) no proof of debt was lodged by the plaintiff with the liquidators of the first defendant in respect of the purported breach of contract by the first defendant; and

(f) subsequent thereto, the first defendant was dissolved.

**[13]** Based on those undisputed fact; the fourth defendant submits that the plaintiff is not a creditor of the first defendant at the material time and therefore has no locus standi to institute the present application under s 304(1) of the Companies Act 1965 against the fourth defendant.

FIRST PRELIMINARY ISSUE: WHETHER THE PLAINTIFF IS A CREDITOR OF THE FIRST DEFENDANT WITHIN THE MEANING OF S 304(1) OF THE COMPANIES ACT 1965

**[14]** There is no dispute between the plaintiff and the defendants that a number of contracts have been executed by the plaintiff and the first defendant. The issues are

regarding the contents of the contracts, the responsibilities of the parties and whether the first defendant has completed it's agreed responsibilities. The issue between the fourth defendant and the plaintiff is regarding s 304 of the Companies Act 1965 and the claim that the fourth defendant being one of the directors of the first defendant, is responsible with the other defendants for the fraud committed against the plaintiff.

**[15]** The fourth defendant's contention is that s 304 of the Companies Act 1965 states that only a liquidator, creditor or a contributory of the first defendant can seek a relief under the said section and the plaintiff is not a liquidator, creditor or contributory of the first defendant as the plaintiff has to first establish as a creditor by finding of liability and therefore has no locus standi to bring the present action.

**[16]** Section 304(1) of the Companies Act 1965 provides:

> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

**[17]** The court is of the view that the word 'creditor' as being used in s 304 should be interpreted in the widest sense and that it includes all persons having pecuniary claims against the company, (in this respect the first defendant) and the creditor should be a person who could enforce its claim against the company by an action of debt and need not establish a finding of liability before becoming a creditor.

**[18]** In *Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v Emporium Jaya (Jerantut) Sdn Bhd* [2002] 1 MLJ 182, the court held at p 193:

> The word 'creditor' is not defined in detail under the Act. Section 217(1)(b) of the Act only mentions any creditor, including a contingent or prospective creditor, of the company.' In the popular meaning of the word, 'creditor is a person or company to whom money is owing. Zakaria Yatim J in *Jurupakat*'s case has said that a 'creditor is a person who could enforce his claim against the company by an action of debt' The claim or debt in question must not be in the form of unliquidated damages (see *Penington's Company Law* (1985) 5th Edition, p 843) When we talk about 'contingent creditor', it simply means that a person who could enforce his claim by an action of debt whether the claim or the right to enforce such claim can be anticipated to arise if a particular event occurs. The words 'prospective creditor' refer to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future.

**[19]** Section 217 of the Companies Act 1965 provides that a 'creditor' includes a 'contingent or prospective creditor'. The word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. That being the case, the court is of the view that the plaintiff comes within the ambit of 'prospective creditor' for it to commence the present

action against all the defendants. The issues whether the plaintiff succeeds or not at the end of the case is immaterial at the commencement stage.

**[20]** On the general rule of construction of statutes, that the same term or expression used in different part of a statute must be accorded the same meaning unless the context otherwise requires. Therefore, the terms 'creditor' in s 304 must be taken to also mean to include 'contingent or prospective creditor' as being used in s 217(1)(b) of the same Companies Act 1965.

**[21]** The above finding is supported by *Halsbury Laws of England,* para 1530 — where the term 'creditor' is defined as 'every person having a pecuniary claim against the company, where actual or contingent.'

**[22]** In *Ganda Holdings Bhd v Pamaron Holdings Sdn Bhd* [1989] 1 MSCLC 90.286, the court has also held:

> ... by reason of the buyer's default in performance of the agreement, the order was converted into a money judgment. The fact that the seller was entitled to damages from the buyer had changed the status of the seller to that of a creditor.

**[23]** The above authorities clearly say that a plaintiff who has a pecuniary claim against the company is a 'prospective creditor' to the company and by virtue of the definition in s 217 of the Companies Act 1965, is also a 'creditor' for the purpose of winding up process of the company including for the purpose of s 304 of the Act. Being a creditor (or prospective creditor) the plaintiff has the necessary locus standi to institute an action against the fourth defendant under s 304(1) of the Companies Act 1965.

**[24]** The fourth defendant argues that the plaintiff (who claimed to be a creditor to the first defendant) should have filed a 'proof of debt' since the first defendant is now under liquidation (voluntary liquidation).

**[25]** In the present case, the first defendant went into voluntary liquidation on 7 May 1999. The second to fourth defendants (who were directors of the first defendant at the material times) have failed to summon a meeting of the creditors of the first defendant as required under s 260 of the Companies Act 1965. No notice was given by the directors to the plaintiff as creditor. All the requirements under s 260 with regard to position of creditors were not complied with by the directors. Such being the case, it is justifiable that the plaintiff could not have exercised its right as a creditor to file a 'proof of debt'. In any event, there is nothing to stop the plaintiff from instituting an action under s 304(1) of the Companies Act 1965, against the first defendant as well as all the directors (second to fourth defendant) if there is a reasonable cause of action to show that the business of the first defendant has been carried on with intent to defraud creditors by any person. Under that section, the court may declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible for all or any of the debts or other liabilities of the company.

SECOND PRELIMINARY ISSUE: IF THE ANSWER TO THE FIRST PRELIMINARY ISSUE IS IN THE NEGATIVE, WHETHER THE PLAINTIFF HAS LOCUS STANDI TO BRING THIS ACTION AGAINST THE FOURTH DEFENDANT PURSUANT TO S 304(1) OF THE COMPANIES ACT 1965

**[26]** Since the answer to the first preliminary issue is in the affirmative, the plaintiff would therefore has the necessary locus standi to bring the present action against the fourth defendant pursuant to s 304(1) of the Companies Act 1965 and it will be superfluous to traverse the ground regarding whether the plaintiff has the locus standi in this application.

CONCLUSION

**[27]** Based on the above considerations, the court holds that the plaintiff in the present action is a creditor (or prospective creditor) to the first defendant and therefore has the necessary locus standi to institute the present action against the fourth defendant pursuant to s 304(1) of the Companies Act 1965. The second issues need not be answered. The fourth defendant is to pay cost of the application to the plaintiff.

*Order accordingly.*

Reported by Sally Kee